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No. 89-708

In The

Supreme Court of the United States

October Term, 1989

MIAMI CENTER LIMITED PARTNERSHIP,

Petitioner,

vs.

THE BANK OF NEW YORK,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT, THE BANK OF NEW YORK

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ISSUES PRESENTED

Does this Court lack jurisdiction?

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BRIEF IN OPPOSITION OF RESPONDENT, THE BANK OF NEW YORK

INTRODUCTION

The Petitioner is one of five affiliated debtors in consolidated proceedings below who have presented their various claims and arguments over the past four years to:

Two different bankruptcy judges;

Ten different district court judges in over 50 separate appeals; and

Eight judges of the United States Court of Appeals in 14 separate appeals and a petition for writ of prohibition and mandamus.

The Petitioner, along with the other affiliated debtors, have twice previously filed petitions for writ of certiorari in this Court and also filed a petition for writ of mandamus here. On all three occasions, this Court denied these petitions.[1]

STATEMENT OF THE CASE

The five affiliated debtors--Theodore Gould ("Gould"), Miami Center Limited Partnership ("MCLP"), Holywell Corporation ("Holywell"), Miami Center Corporation ("MCC"), and Chopin Associates ("Chopin")—all filed voluntary petitions in bankruptcy on August 22, 1984. The bankruptcy cases initially were consolidated for joint administrative purposes, and the five debtor estates were later substantively consolidated by Order dated July 23, 1985.[2] Gould owned 100% of the stock of fellow debtor Holywell, and also served as president and sole director of Holywell. In turn, Holywell owned 100% of the stock of debtor MCC, and Gould served as president and sole director of MCC. Gould and MCC were the sole general partners of debtor Chopin, and of debtor MCLP.

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[1] Case Nos. 88-80, 87-1988 and 87-1989. References to the Petitioner's appendix will be denoted as "App. ___."

[2] Under the bankruptcy and equitable doctrine of "substantive consolidation," the assets and liabilities of related debtors are pooled, and the inter-debtor obligations are eliminated.

All five debtors were involved in developing the Miami Center Project, an office building and hotel complex in downtown Miami.

Gould was also a 50% partner and the "managing venturer" of Miami Center Joint Venture ("MCJV"). Olympia & York Florida Equity Corp. ("O&Y") owned the other 50% of MCJV.[3]

In May of 1981 MCLP leased $7.775 million worth of furniture, fixtures, and equipment ("FF&E") from MCJV under two virtually identical lease agreements. Under these leases, MCLP was required to pay a total monthly rental of $195,281.25 to MCJV. MCLP, however, never made a single payment (Gould was managing general partner of both entities, the lessor and the lessee). Both leases contained the following purchase option whereby MCLP could acquire title to the FF&E:

> Lessee shall have the option to purchase at any time all, but not less than all, the [FF&E] at a price equal to the fair market value thereof

Paragraph 18 of May, 1981 leases.[4]

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[3] Neither MCJV nor O&Y were debtors below. Further, neither MCJV nor O&Y are petitioners here.

[4] Both leases further provide in paragraph 30 that the terms of the lease "shall in all respects be governed by and in accordance with the laws of the state of Florida."

Respondent, the Bank of New York (the "Bank")[5] was the lead construction lender for the Miami Center Project. The Bank obtained a final judgment establishing the amount of its mortgage lien at over $234 million as of March 1985. The Bank proposed a plan of reorganization (the "Plan") which all classes of creditors overwhelmingly accepted but the five debtors, MCJV, and O & Y opposed.

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[5] Pursuant to Supreme Court Rule 28.1, the following is a listing of the relationships of the Bank of New York:

(a) Parent of the Bank – the Bank of New York Company, Inc.

(b) "Affiliates" of the Bank are:

BNY Holdings (Delaware) Corporation
The Bank of New York (Delaware)
The Bank of New York Overseas Finance, N.V.
Affinity Group Marketing, Inc.
ARCS Mortgage Corp. (Fla.)
ARCS Mortgage, Inc. (Calif.)
BNY Leasing, Inc.
Eastern Trust Company
The Bank of New York Life Insurance Co., Inc.
Capital Trust Company
BNY Financial Corporation
BNY Personal Brokerage, Inc.
Beacon Capital Management
The Bank of New York Trust Company, Inc.
The Bank of New York Trust Company of California
The Bank of New York Trust Company of Florida, N.A.
Leonard Newman Agency, L.P.

Under the Plan, the Bank's designee (the "Purchaser"), which was a partnership comprised of affiliates of the Bank and the participating lenders, bought the Miami Center Project, including all of the FF&E, for its MAI-appraised value of $255.6 million. The Bank paid that amount by paying approximately $13 million in new cash over and above the judgment lien on the mortgages held by the Bank (that lien, with interest, was over $242 million by October, 1985). In addition, the Bank released approximately $30 million of cash collateral (which was used to pay hundreds of creditors pursuant to the Plan). On October 10, 1985, all of the debtors' property became property of the "Miami Center Liquidating Trust," which then sold the Miami Center Project (including the FF&E) to the Purchaser in accordance with the terms of the Plan. The Plan required the Liquidating Trust to take any action necessary, including the exercise of the FF&E lease purchase options, to obtain title to the FF&E so that the Liquidating Trust could convey the FF&E to the Purchaser at the closing. If the Liquidating Trustee could not for any reason convey the FF&E to the Purchaser, the Plan provided that the purchase price would be reduced by the replacement cost of the FF&E. The Liquidating Trustee delivered to the Purchaser at the closing on October 10, 1985 a bill of sale transferring the FF&E to the Purchaser and containing a full warranty of title.

During the bankruptcies, MCJV and O&Y filed a proof of claim and an amended proof of claim against MCLP for unpaid rent and for the purchase option price. Gould joined in and supported the amended proof of claim, Claim No. 502.

At the time of the October 10, 1985 sale, MCJV had taken no action to (a) demand possession of the FF&E, (b) obtain relief from stay to recover the FF&E, (c) declare the purchase option provisions of the FF&E Leases terminated, or (d) exercise the purchase options as set forth in the leases. Similiarly, the Petitioner had taken no action to reject the Leases in the bankruptcy proceedings.

As directed by the district court, on April 16, 1987, O&Y, MCJV, Gould, and MCLP participated in a duly-noticed bankruptcy court hearing to fix the amount of Claim No. 502 (the Bank and MCLP disputed the amount). After receiving evidence and reviewing the parties' memoranda, the bankruptcy court ruled that (a) title to the FF&E passed to the Liquidating Trustee pursuant to the Plan on October 10, 1985, (b) the Trustee then sold the FF&E to the purchaser as part of the $255.6 million sale of the Miami Center Project, and (c) MCJV's claim against the Liquidating Trust (as successor to MCLP's assets and liabilities) was allowable at approximately $14.5 million, consisting of $8.6 million in rent and late charges and $5.9 million for the exercise price of the purchase option and interest. App. 19.

The debtors, including the Petitioner and non-debtors, O&Y and MCJV, all appealed the bankruptcy court's decision to the district court. After reviewing the briefs submitted by the parties and hearing oral argument, the district court affirmed the bankruptcy court. App. 9 and App. 16. The debtors, including the Petitioner and non-debtors, O&Y and MCJV, then filed an appeal with the Eleventh Circuit. The Eleventh Circuit held, as it

had previously in a related appeal,[6] that "the plan ha[s] been substantially consummated . . . and that it ha[s] become legally and practically impossible to unwind the consummation of the plan or to otherwise restore the status quo before confirmation." App. 8; *In re Holywell Corp.*, 874 F.2d 780, 782 (11th Cir. 1989). As a result, the Eleventh Circuit affirmed the judgment of the district court. App. 8. Motions for rehearing were filed by (a) debtors MCLP and Gould and (b) non-debtors O&Y and MCJV. Both motions were denied. App. 1, 3. Only debtor MCLP seeks further review here.

ARGUMENTS AGAINST GRANTING THE WRIT

Through the commencement over the past four years of over 60 appeals from bankruptcy and district court orders, and in the three petitions for review by this Court, the Petitioner has ignored prior rulings and has attempted to systematically dismantle the confirmed and substantially consummated Plan. This Court and all of the courts below it have denied these attempts.

This Petition is no different. Moreover, the process of fixing the amount of a creditor's claim is inherently a fact-finding. The calculation of rent payable, the determination of market value, the issue of whether the parties intended for title to pass, and the question of whether the provisions of the Plan constituted "adequate assurance" of payment—are all factual issues subject to the "clearly

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[6] *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 109 S. Ct. 69 (1988).

erroneous" standard as given "strict application." *Birmingham Trust Nat'l Bank v. Case*, 755 F.2d 1474, 1476 (11th Cir. 1985); *In re Garfinkle*, 672 F.2d 1340, 1344 (11th Cir. 1982).

This Court does not grant certiorari to review evidence and discuss specific facts (*United States v. Johnston*, 268 U.S. 220, 227 (1925)), and this is particularly true where findings of fact have been concurred in by both the court of appeals and the district court. *Rogers v. Lodge*, 458 U.S. 613, 623-24 (1982); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). In the *Graver Tank* case, Justice Jackson stated: "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." 336 U.S. at 275. No error, much less any "obvious" or "exceptional" error, has been shown by the Petitioner here.

Because the Eleventh Circuit held that the Petitioner's appeal is moot, however, this Response will not address the merits.

LACK OF JURISDICTION

A.

Petitioner Has Failed to Establish An Appropriate Basis for This Court's Certiorari Jurisdiction

The Petitioner has failed to establish any of the considerations governing review on certiorari as set forth in Rule 17 of the Supreme Court Rules. These considerations, "while neither controlling nor fully measuring the

Court's discretion, indicate the character of reasons that will be considered." Sup. Ct. R. 17.1. The failure to point to any conflict or any important question of federal law weighs heavily against jurisdiction in this matter.

On the contrary, it is apparent that the core issues determined by the bankruptcy court concerned the interpretation of the terms of two leases—both of which by their terms are governed by Florida law. Thus, nothing in the bankruptcy court's determination as to the rent payable, the market value, the passage of title or the "adequate assurance" of payment raises an important question of federal law.

B.

The Petition Is Moot

The Petitioner is again clamoring for the return of something the Bank specifically bargained for in the Plan. This Court has previously denied the debtors' petition for writ of certiorari from the Eleventh Circuit's opinion below that the debtors' appeals are moot. *Miami Center Ltd. Partnership v. Bank of New York*, 109 S. Ct. 69 (1988).[7]

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[7] This Court has consistently denied certiorari jurisdiction where the court below held that the action, in whole or in part, was moot. *See, e.g., United States v. Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Ass'n*, 871 F.2d 401 (3d Cir.), *cert. denied*, No. 88-2085 (Nov. 6, 1989) (WESTLAW WL 115098); *Folkstone Maritime, Ltd. v. CSX Corp.*, 866 F.2d 955 (7th Cir.), *cert. denied*, 110 S. Ct. 60 (1989); *Tyler v. Black*, 865 F.2d 181 (8th Cir.), *cert. denied*, 109 S. Ct. 1760 (1989); *Spears v. Thigpen*, 846 F.2d 1327 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 876 (1989); *SunTek Indus., Inc. v. Kennedy Sky Lites, Inc.*, 848 F.2d 179 (Fed. Cir. 1988), *cert. denied*, 109 S. Ct. 793 (1989).

The conveyance of the FF&E to the Purchaser constituted an integral element of the Plan. The bankruptcy court confirmed the Plan, the closing occurred on October 10, 1985 with no stay in effect, and the purchase price was paid.

This Court and the federal circuits have consistently and uniformly held that a debtor's failure to obtain a stay pending appeal renders an appeal moot after a plan has been substantially consummated. *In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C. Cir. 1986); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984); *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981). "In this situation the mootness doctrine promotes an important policy of bankruptcy law—that court-approved reorganizations be able to go forward in reliance on such approval unless a stay has been obtained." *In re Information Dialogues, Inc.*, 662 F.2d 475, 477 (8th Cir. 1981). Moreover, the implementation of a confirmed plan forever changes the positions and rights of the parties. It is these changes in circumstances, and the creditors' reliance on a confirmed plan, that make it impossible to fashion a remedy that would restore the interested parties to their former positions.

In this case, the bankruptcy court's calculation of the MCJV claim turned on a determination of whether or not title to the FF&E had passed pursuant to the terms of the Plan. The bankruptcy court found that confirmation of the Plan had disposed of that question. App. 25. The district court affirmed. App. 16. Because the entire case was controlled by the terms of the Plan, and because the Plan had been substantially consummated, the Eleventh Circuit correctly held that the appeal was moot.

C.

Petitioner Lacks Standing

Throughout its Petition, MCLP attempts to argue on behalf of MCJV: (1) "a nondebtor lessor is [not] bound by a judgment in appellate proceedings of a confirmation order to which it is not a party." (Petition, pages 2, 25-26 and 30); (2) the dismissal of "the debtor's appeal of the Bankruptcy Court's confirmation order on the grounds of mootness [is not] binding and could [not] adversely affect MCJV's interests since it was not a party in that case" (Petition, pages 3-4, 25-26, and 28-30); (3) the FF&E could not be sold without MCJV's consent (Petition, pages 4, 17-18 and 21-22); and (4) the bankruptcy court violated the Fifth Amendment by approving the taking (albeit with due consideration) of MCJV's property. Inasmuch as MCJV is not a party to this Petition, the Petitioner lacks standing to assert the objections of MCJV as a method of attacking the validity of the overall reorganization plan. *Diamond v. Charles*, 476 U.S. 54, 61-72 (1986); *Allen v. Wright*, 468 U.S. 737, 750-51 (1984). MCLP was a debtor and lessee; it has no standing to assert claims and arguments on behalf of the lessor and non-debtor, MCJV.

CONCLUSION

For all of the foregoing reasons, this Court should again deny the Petitioner's petition for certiorari review.

Respectfully submitted,

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